No. 86-381

COPY

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1986



PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

v.

SUPERIOR COURT OF THE STATE OF CALIFORNIA, FOR THE COUNTY OF SAN BERNARDINO,

Respondent,

RICHARD SMOLIN AND GERARD SMOLIN,

Real Parties in Interest.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

# JOINT APPENDIX

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PETITION FOR CERTIORARI FILED September 2, 1986
CERTIORARI GRANTED December 1, 1986

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EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.



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Relevant Docket Entries

August 13, 1984 - Real parties in interest filed separate petitions for habeas corpus relief in San Bernardino County Superior Court (Case No. SCV 224030)

August 24, 1984 - Hearing in superior court on order to show cause. Petitions granted; real parties in interest ordered discharged. (See Jt. App., pp. 3-54, infra.)

September 17, 1984 - People filed petition for writ of mandate in California Court of Appeal, Fourth Appellate District (Case No. E001358)

March 26, 1985 - California Court of Appeal, Fourth Appellate District, District Two, filed its opinion reversing respondent superior court. (See Pet. App. B.)

May 3, 1985 - Real parties filed petition for review in California Supreme Court

May 23, 1985 - California Supreme Court granted review (Case No. LA 32068)

October 8, 1985 - Oral argument in California Supreme Court

May 1, 1986 - California Supreme Court filed its opinion reversing court of appeal and upholding respondent superior court's order discharging real parties in interest (Pet. App. A)

June 5, 1986 - People's petition for rehearing denied.

SUPERIOR COURT OF THE
STATE OF CALIFORNIA
FOR THE COUNTY OF
SAN BERNARDINO

DEPARTMENT NO. 1
HON. WILLIAM PITT HYDE,
JUDGE

| | |
|---|---|
| In re GERARD J. SMOLIN and RICHARD SMOLIN on Habeas Corpus, Petitioners | SCV-224030 |

REPORTER'S TRANSCRIPT ON
ORAL PROCEEDINGS

Friday, August 24, 1984

APPEARANCES:

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REPORTED BY: EVA LORENE PALMER,
C.S.R.
Official Reporter,
C-4669

SAN BERNARDINO, CALIFORNIA; FRIDAY, AUGUST 24, 1984, 2:14 P.M. DEPARTMENT NO. 1 HON. WILLIAM PITT HYDE, JUDGE

APPEARANCES:

The Petitioner, Richard Smolin, present with and by counsel, ALBERT H. MALDONADO, Attorney at Law; the Petitioner, Gerard J. Smolin, with and by counsel, LARRY F. ROBERTS, Attorney at Law; the Respondents represented by JOSEPH A. BURNS, Deputy District Attorney.

(Eva Lorene Palmer, C.S.R., Official Reporter, Lic. No. C-4669)

THE COURT: Gerard Smolin.

MR. ROBERTS: Good afternoon, your Honor, Larry Roberts appearing on behalf of Mr. Smolin. He is present. We are ready. I believe he is out in the hall.

MR. BURNS: Deputy District Attorney Joseph Burns appearing for Respondent, your Honor.

THE COURT: This is with regard to both Richard and Gerard, isn't that right?

MR. MALDONADO: Yes, your Honor. Albert Maldonado for the Petitioner Richard Smolin.

THE COURT: All right. And the parties are present, you are saying?

MR. MALDONADO: Yes, Mr. Richard Smolin is present, your Honor.

MR. ROBERTS: Yes, and Gerard is present.

THE COURT: Gerard Smolin is present?

MR. ROBERTS: Yes, he is, your Honor.

THE COURT: The Court has just now received the return to the order to show cause. And, basically, the documents in the file, now in the files, I should say, really do amount to essentially an order to show cause for hearing at this time. And that is in the file 224030, which

is the principal file, I do believe. The documents were also filed in FL30380 which was and is the family law file.

I noted Mr. Burns' concern about some of the -- as he indicated, things had gotten off on the wrong foot, with regard to the filing and designation of documents in the file in which they were placed. And I think maybe there is some merit to that. But, as I understand it, what we are really concerned about here, and the bottom line is this issuance of a writ at this time to, in effect, prevent the extradition process from proceeding. And that basically would be in 224030.

Does anybody really have any quarrel about that?

MR. MALDONADO: I have no quarrel with that issue, your Honor.

THE COURT: I think the family law file is a matter of some interest and relevance to these proceedings, because I think again where we go is the -- again, consideration of whether or not the family law proceedings up to this point have some bearing on the Louisiana proceedings and, I guess, more specifically, whether they have some bearing on the Court's determination as to whether or not the initiation of the Louisiana proceedings in the first instance was done under any color of right. And I think Mr. Burns will want to address that.

One other point, probably we should cover at this juncture, and that is that question of whether this Court should consider this matter, having been involved in the family law

proceedings. Mr. Burns raises the point, and I think appropriately so, that we do have a habeas corpus department in this court, we do have, generally speaking, our habeas corpus proceedings proceed in that department. When the initial papers were presented to me and there was a question in my mind as to whether I should put it in this department or in Department 14, I concluded that it might be more cost effective, from a time standpoint, to put it in this department, because I at least was familiar with all of the proceedings that had taken place up to this time. I felt that with Judge Cranmer's writ calendar being what it is, that he has some limited time to devote to a large number of writ cases, and that for him not to have to go back and digest through this, it just seemed

to me it was more time cost efficient to put it in here. But if anyone wants to file an affidavit against this court, it wouldn't hurt my feelings. Otherwise, we can proceed with it.

Okay. This is an order to show cause brought on behalf of Gerard and Richard Smolin, and the prosecution having filed its return, I think at this juncture we can proceed in normal course of affairs. Who would like to go first?

MR. MALDONADO: I would, your Honor, since we have the burden.

THE COURT: Yes.

MR. MALDONADO: Your Honor, I can perceive the District Attorney, with all due respect, making arguments that somewhere along the line I'm going to be arguing family law, the Parental Kidnapping Prevention Act and the

Uniform Child Custody Act, and that they have no relevance or basis in this proceeding because it is simply to determine whether or not the extradition warrant is valid on its face, in which there are four areas. I accept Mr. Burns' challenge that this is a criminal proceeding, it is a constitutional proceeding, and that we should, at the outset, direct ourselves to those four issues.

There is no question that my client, Richard Smolin, is the correct party in this matter. We have no quarrel with the identification.

We go to the second issue, and really the bottom line, as to whether or not the paperwork, the affidavit, the charges, the criminal documents from St. Tammany Parish in Louisiana are proper on their face.

And there is significant California law in 1891, a case called Spears, S-P-E-A-R-S, it is still authority, it is still the law of this State, it is a Supreme Court decision. Mr. Burns attempts to distinguish this case and he does mention it in his points and authorities. But this is a significant case, because the bottom line is that if a person in another state can say, "I believe a woman or man has committed a crime, I may not have seen it, but upon information and belief I think, I believe, I have been informed, this person should be arrested." Then the liberty and the freedom of California citizens can be taken away simply on the statement by a citizen of another state eight hundred miles away in the State of Louisiana.

The State of Louisiana, in its documents that they filed and in their statements that they have issued all along is that "Why do you want to challenge Louisiana laws? We have respect due to our laws as well as your State in California and Texas." The problem is that the affidavit of Judith Pope, the mother of the children, is abundant, it is pregnant with information and belief in which she, herself, does not have personal knowledge and in other instances in which she, herself, has conducted herself in a fraudulent and a perjurious manner. I know the D.A. is going to say that has nothing to do with that, go argue that in Louisiana, bring that as an affirmative defense in Louisiana and let some Louisiana lawyer in a criminal trial raise that as a

defense. The California Supreme Court, your Honor, in this In re Spears case said, you have the right, you have the obligation, and you have the authority to test that affidavit of Judith Pope today.

I am going to take her affidavit line by line and indicate to the Court why I believe Richard Smolin should not be sent back on the basis of her affidavit. She states that, "The information regarding the actual kidnapping was told to the affiant by witnesses Mason Galatas and Cheryl Galatas of 2028 Mallard Street, Slidell, Louisiana, and Jimmie Huessler of 2015 Bridle, Slidell, Louisiana." We don't have Jimmie Huessler's affidavit here, we don't have Mason Galatas' here, we don't have Cheryl Galatas' affidavit here. We have

hearsay upon hearsay that she believes that her children were kidnapped because it was told to her by three other people. The State of Louisiana has failed to make their paperwork valid on its face.

Looking at the context of the affidavit in her first sentence, she says, "On March 9, 1984, at approximately 7:20 a.m., Richard and Gerard Smolin kidnapped Jennifer Smolin, age ten, and James C. Smolin, age nine, from the affiant's custody while said children were at a bus stop in St. Tammany Parish, Louisiana." You would think she was at the bus stop, you would think she was present and she was a percipient witness. And, yet, this is contradictory to her sentence where she was told by three other people.

In re Spears does not say that a judge has a perfunctory duty simply to look at Governor Deukmejian's extradition arrest, it does not simply say that you look at Governor Edwin Edwards extradition papers perfunctory and just move them along like some rubber stamp, just process it as a clerk. It goes far beyond that, your Honor.

In In re Spears, the alleged fugitive in that case was not substantially charged with the crime of embezzlement. And the Supreme Court of the State of California said that whether or not a fugitive is so substantially charged with a crime is a question of law. It is a question of law, it is not a question of fact. It is a question of law, which is always open.

The statement of a fact is what makes an affidavit. We have here statements that are not factual. We have statements that are fatally defective. And charges, as the Supreme Court says, are not verified by an affidavit that somebody is informed and believes that they are true. She is saying, "I believe and I am being told that my children were kidnapped." And then in her last sentence she says, "They were without authority to remove the children from the affiant's custody." And she says it is based on a Texas court order dated February 13, 1981. She is not lying there, but she is also not telling the truth.

There were other court orders in California -- and this is where I am getting into the custody and the family law realm of it. There were

other California orders existing at the same time. And for the Court to ignore and to not look at those valid California orders that were issued by Judges Campbell, by yourself, by Commissioner Kraig Zappia is to defy the realities of this case.

Mr. Smolin, on October 20th, 1980, secured a valid California order giving him joint custody. On October 27th, 1980, Mrs. Smolin-Pope got an order in Texas saying she had full custody.

Under the Parental Kidnapping Prevention Act, which is a federal law cited at 28 US Code 1738, subsection A, subsection (g), the law provides that the Court shall not exercise jurisdiction in any proceeding for custody determination commenced during the pendency of a proceeding in a court of another state where such court of

that other state is exercising jurisdiction consistently with the provisions of this section. I misquoted myself, your Honor, that is subsection (g).

If, for the moment, we accept the argument that California had a pending proceeding on October 20th, 1980, and if we accept that Texas initiated its order on October 27th, 1980, then Texas was without authority legally to issue a full custody, full faith and credit modification. In turn, the State of Louisiana said, "Look, the State of Texas is a sister state like California, it is going on and honoring a California order. Therefore, we are going to honor the Texas order and make it our own and she can go ahead and adopt these children out."

The problem with the affidavit of Judith Pope is that, not only is it factually defective, but she fails to tell the truth, she fails to reveal all that is necessary. In effect, you have Louisiana authorities that are going on the misinformation and disinformation of an affiant who has submitted herself to the jurisdiction of this Court many times before the kidnapping charges were issued and after the kidnapping charges were issued, and she has the gall to say that she had full custody, when this Court knows, by its own valid orders, that she did not have full custody, she had joint custody and later she had no custody.

The California Supreme Court in Spears said, "The liberty of a citizen cannot be violated upon the

mere expression of an opinion under oath that he is guilty of a crime." She is giving an opinion that she had valid custody orders, it is the opinion of herself. The opinion can be challenged by the jurisdictional proceedings of Texas and of California.

The District Attorney indicates in his return, your Honor, that, at least, I am attempting to battle the Information, that it does not correctly charge a crime. I take issue with that. The Executive Department says that he is charged with the crime of simple kidnapping from Louisiana. The Assistant District Attorney Margaret A. Coon, C-O-O-N, and William A. Alford, Jr. have issued Informations that my client is guilty of simple kidnapping. There is a subsection to Louisiana law that if a

parent does not have valid custody and goes into another state or goes into the area where the parent has custody and takes those children, he or she is guilty of a crime in this instance. Now, I am quoting Louisiana law in my memorandum of points and authorities. Louisiana is an enlightened state, it has had these issues before. I don't think it is arguing the merits of this case, I think it is arguing the law.

Her affidavit is replete with inconsistencies and incorrections. But my client, when he went to Louisiana on March 9, 1984, had valid custody orders. She knew that they were valid custody orders. She was served personally to appear in California and he had every right as a father, every right as a father to see and to remove his children to this State. You cannot

commit a crime, you cannot do wrong by taking that which is legally your own. Mr. Burns may disagree and say that it is a fine argument to raise in defense trial for affirmative defense. But it goes to the issue of Mrs. Pope saying, "I had valid custody orders at the time that my children were taken." I would ask the Court to keep in mind that the issues of extradition, whether or not my client is a fugitive from justice, whether or not my client is substantially charged with the crime, and whether or not the papers are on their face accurate, must be taken into light of this writ of habeas corpus hearing. But I ask the Court not to divorce itself from the realities of the family law proceedings which clearly establish legal right for my

client to have and to hold his children. Thank you.

THE COURT: Thank you, Mr. Maldonado. Mr. Roberts?

MR. ROBERTS: Thank you, your Honor, I have prepared a considerable exposition of arguments that I am presenting to the Court in reading my points and authorities, but many of the points that I was going to develop, Mr. Maldonado touched on them. So I will try to make myself a little briefer than the notes that I have.

First, and preliminarily, before I go further, I ask this Court to take judicial notice of the file in In re Marriage of Smolin, which is numbered Family Law 30380, I believe the Court has it before it now. Particularly, in my file, those orders and documents which are attached to the

habeas corpus petition filed by Gerard Smolin.

I also join in the moving arguments Mr. Maldonado has made, to the extent he has made them.

The People, in filing their have return, I think, done a fine job of setting forth the nature of the extradition law and the elements that are necessary and appropriate for the Court to review and those elements which are necessary and inappropriate for the Court to review. But, I wish to express that this case is -- this extradition case cannot be taken in a vacuum. There is more here than merely whether the charges or the affidavit -- the charges, the forms and so forth set forth a crime. It is not -- there is more here than this stack of papers. There is a lot of what is in that

domestic relations file and it all relates in one way or another to Mr. Gerard Smolin and whether or not he committed a crime in Louisiana.

Of the four tests that this Court can appropriately apply in determining whether Mr. Smolin should be extradited, probably the one most significant in this case is whether or not a crime has been charged. The crime charged by the Information is that he, Gerard Smolin, committed simple kidnapping by taking the children, one in each count, from their mother who had custody. And that allegation is supported by mother's affidavit. Mr. Maldonado has spoken to the nature of that affidavit. I believe him accurate in everything that he says, although I think he is being generous. Mrs. Pope does more than

simply not tell the truth, Mrs. Pope deceives in that affidavit. I believe that she commits perjury. And I stress that on the Court. And I think that she does it on its face, knowing that if she doesn't do that, a crime is not going to be charged and she is not going to be able to achieve the end which she is after, that is, the return of the children. But the real question then is whether that is a defense to the charge of simple kidnapping or whether the affidavit and charges are defective on their face.

If the affidavit is perjurious or if the affidavit does not tell the complete truth on its face, I have to wonder where the probable cause is to charge in the first place. And if the authorities who issued the complaint and Information know that the

statements contained therein are untrue or subsequently find out they are untrue or should have known they are untrue, where is the probable cause for the charging of the crime? I think that those elements are more than a mere defense to the crime, those elements go directly to whether or not a crime is substantially charged.

Curiously, reviewing the affidavit signed by Judy Pope, reviewing the affidavit signed by Mrs. Coon, and reviewing the Information filed by the District Attorney in St. Tammany Parish, nowhere is there an allegation that the taking of these children was for an unlawful purpose, no place in any of those documents. And, further, there is absolutely no indication that the taking by Mr. Gerard Smolin was to

obstruct or to otherwise frustrate a pending Louisiana court proceeding, not mentioned in any of those pleadings.

It is obvious, from the face of the documents, that Mrs. Pope did not have custody. Let me rephrase that. Well, it is not obvious from the face of the documents that Mrs. Pope has custody. Taking judicial notice of the family law file in conjunction with the documents, it is obvious that she did not have custody of the children and it is obvious that she knew she didn't have custody of the children, and it is, therefore, obvious that she made a misstatement or perjured herself.

I have to ask the question, since the affidavits and Information refer to a Texas full faith and credit decree and judgment, I have to ask the

question whether, because Texas takes jurisdiction over these children, California's jurisdiction is thereby divested. And, in reviewing that issue, I find that it is not. In fact, all Texas' judgment really does is reinforce California's judgment. Subsequent California modifications, particularly those which Mrs. Pope and the District Attorney in St. Tammany Parish become aware of, are not ignorable. As authority for those positions, I cite 28 United States Code Section 1738, large Paragraph A, small paragraph (a).

And if Mr. Smolin is not being substantially charged with a crime -- Mr. Gerard Smolin has not been substantially charged with a crime, than Mr. Smolin is not a fugitive from justice. Because, in order to be a

fugitive from justice, one must have committed a crime in another state. What we have here is an exemplar citizen of this state before this Court sought to be extradited to another state, a foreign state with a foreign jurisdiction, for committing an act which is alleged to be a crime by an allegation from a complainant which is perjurious, or, at very least, is not based upon divulging of the full truth. The act committed by Mr. Smolin is not, in fact, criminal.

On behalf of Mr. Smolin, I request this Court to grant the petition and deny the extradition. Thank you, your Honor.

THE COURT: Okay, thank you. Mr. Burns.

MR. BURNS: Thank you, your Honor.

Your Honor, in the return which I have prepared and filed this date with the Court, I have addressed, to my satisfaction, each of the arguments counsel have advanced here in court today and I think I can do no better. Certainly, I could not respond to them more concisely than I have done in my papers, so I do not intend to go into great lengths on all the points they have been discussing here.

They can legitimately in this very special proceeding challenge the sufficiency of the papers which support the extradition. And about the best they have been able to do in that respect is to cite the In re Spears case, challenging that Judith Pope, Richard's ex-wife's affidavit in Louisiana is defective because it is based on information and belief. And

Spears does talk about that and does say that.

What Mr. Maldonado did not talk about, however, was that California Supreme Court decision of In re Cooper, which sets up a standard which we do comply with in this case. And that is, a standard which involves the setting forth of sources of information and reasons for belief within the affidavit in question. That was done in Cooper. The facts in Cooper, too, are more like ours. In that, unlike the Spears decision where only the affidavit was involved in the extradition process, the Spears extradition process, as I understand that case, involved only an affidavit, and the whole thing turned on that. And the Court there said that the affidavit was based solely on

information and belief and, therefore, failed, was invalid. We have a different situation here. We have a different kind of affidavit wherein Mrs. Pope recites the sources of her information and the reasons for her belief. That sets this case apart from Spears and puts it in Cooper, I say, but we also have an Information. And the Information I think cannot more substantially charge an offense than does the Louisiana Information in this case. It states plainly that both Gerard and Richard Smolin kidnapped the two children. I do not see how a pleading and accusation of a crime could be more substantially made.

I have, again, in my papers, quoted from Cooper. And I think it may be appropriate to end my comments here with that quotation. I am quoting from

Cooper, which quotes from an earlier decision.

> "When it appears, as it does here, that the affidavit in question was regarded by the executive authority of the respective States concerned as a sufficient basis, in law, for their acting -- the one in making a requisition, the other in issuing a warrant for the arrest of the alleged fugitive -- the judiciary should not interfere, on habeas corpus, and discharge the accused, upon technical ground, and unless it be clear that what was done was in plain contravention of law."

It is obvious that we are dealing with an extradition process in which both the Louisiana authorities and the California authorities have concluded that the paperwork is sufficient. And my return, I hope, will show the Court that indeed that is the case under the law. And I submit that there are no defects shown by Petitioners in this extradition

process, and that it must be allowed to proceed. Thank you.

THE COURT: Let me ask you a question, Mr. Burns, with regard to that.

Do you perceive that the same ruling would necessarily follow for both parties in this case? In other words, if a writ were granted for Richard, it would, ipso facto, have to be granted as far as Gerard? I would think so, but I really don't know and I don't know if anybody has really considered that. They obviously acted -- whatever was done was done in concert between the two of them.

MR. BURNS: That is my understanding of the facts, but I don't know if we have to go that far. The charge in Louisiana is against both of them and I think the Information

alone is sufficient to make this process go through.

THE COURT: Didn't we also have a transcript of the family law, of the ruling of the Court?

MR. MALDONADO: Yes, your Honor, I have a copy.

THE COURT: Could I look at that? I don't know where my original is.

Do you have any objection, Mr. Burns, I am sure he has marked it up and --

MR. MALDONADO: I will take off the paperclips.

MR. BURNS: I have no objection to the Court's looking at it. I do object to its being considered in this process.

THE COURT: Okay, I need to look at it to find out, number one,

whether I can or should take notice of a ruling -- if in fact the Court in the prior proceeding did make a finding based upon testimony of all the parties, including Mr. Smolin and Mrs. Smolin, that she, in all her conduct, was acting improperly or fraudulently or in complete disregard of Mr. Smolin's parental rights, then in addressing the question now before us as to the sufficiency of the paperwork that goes into a criminal charge in Louisiana, doesn't that finding really have something to do with this habeas corpus proceeding?

MR. BURNS: I don't know how the inquiry fits within any of the four grounds that can be raised in this proceeding, your Honor.

THE COURT: Because if she makes an affidavit saying that, "I have

full custody of these children, these children were taken from my custody, and they were taken wrongfully." And she knows that is not true, and this Court has, in essence, made a finding that that is not true, that she, if you want to put it in common terms, lied when she said that, then doesn't that finding, no matter where it appears, in the family law file or this file, or anywhere else, come into play?

MR. BURNS: I believe that that kind of inquiry necessarily goes beyond the face of the affidavit. And the inquiry to which this Court is restricted is on the face of the papers, that is the grounds which Petitioners have raised, and you cannot look at the face of the affidavit and follow the line of argument which counsel have advanced, your Honor is

now discussing. In order to invalidate the affidavit, in order to find that she was lying, you have to go beyond that. I think that is improper.

THE COURT: Why? In general, aren't the affidavits brought to the judge or the magistrate and the judge look at that document and there it is, it is there in black and white, and the judge has no way of testing it or knowing anything to the contrary. But if in fact, when this affidavit is brought to the judge, whether it is a Louisiana judge or Texas judge or California judge, and the judge looks at that affidavit and says, "That is wrong, it is total fabrication, I know, I was there." Is there some obligation for the court to then proceed and, because it says it is packaged nicely

and says the right words, to go ahead and act on that affidavit?

MR. BURNS: Well, I don't think your Honor is acting on the affidavit at all. I think --

THE COURT: I am if I uphold the extradition proceeding.

MR. BURNS: I perceive it differently, your Honor. What you are acting upon here is the challenge against the paperwork, which the Petitioners have brought. You are being asked to invalidate a process which is in motion and which has been cleared by the executive authorities of two different states as being proper under the law that applies to it. To go beyond that affidavit and to say that you believe that the statements made within it are false, based upon proceedings had before you, I think is

to exceed your jurisdiction in this matter.

THE COURT: You know, that is what -- that does concern me. And I suppose that is the danger of having a judge who has sat on one aspect of the case suddenly get into another, but I think that again, as I reflect upon it, I don't think it is certainly improper, because I think that if this went to our habeas corpus judge, or any other judge in this court, that particular judge would, in evaluation of the whole proceeding, have to do exactly the same thing that I am doing now, ask the question, "Is it proper to go back and consider a finding that, in essence, was made in a California file in our proceeding where those people were here in live flesh and blood and testified and findings were made."

MR. BURNS: There are two thoughts I have on that. One is that at the bottom of the line of thinking lies the proposition that the Petitioners are not guilty of the Louisiana charge. And I think everybody in the courtroom knows that that cannot be inquired into in this proceeding. And that is really what that line goes to.

THE COURT: Well, obviously, if I find the affidavit is false, then maybe I am at the same time saying, yeah, that Louisiana kidnapping charge doesn't sound too hot to me. But you are right in principle, certainly I should not be judging Louisiana's sufficiency of proof that they might have in the case or judge that case for them.

MR. BURNS: I have invited the Court in my papers to consider how this proceeding would be undertaken in a court in another jurisdiction besides California, should the Petitioners have been apprehended, let us say, in Arizona. And I think the Court there would properly, if invited to inquire in the relative merits of a custody dispute, say "That is nothing I can decide. The papers are, on their face, in order under the law, and the Petitioners must be delivered to Louisiana authorities." And I think that is exactly the position this Court has to take. The family law matters before your Honor notwithstanding.

THE COURT: Well, maybe it would be a little different if they were in Arizona and Arizona was conducting an extradition proceeding

and Arizona saying, "Okay, we are going to look at it within the framework of what our Arizona process is when an extradition is issued out of Louisiana and the Arizona Governor said it's fine, and so we don't need to worry about what's going on in California." But we are not dealing with that. We are dealing with California here and now, and this is the very forum which this whole scenario initiated, and it arose out of a California relationship, California marriage, California divorce, ongoing custody fight, various orders have been signed, and so I think that maybe we do have some responsibility of looking more -- I suppose, more with a critical eye at the documentation that comes out of another State and, in effect, will operate to countermand our

jurisdiction, our valid orders with regard to custody and possession of children and visitation, and the whole thing.

MR. BURNS: Well, I think your Honor -- pardon me, I think your Honor has to admit that those concepts and concerns go beyond the four grounds which can be raised and considered in this particular proceeding.

THE COURT: It is hard to say when you cross over the line.

Well, Mr. Maldonado, do you wish to respond?

MR. MALDONADO: No, your Honor, I will submit it.

THE COURT: Well, I would only -- I will take judicial notice of the California family law file, and, as part and parcel of that, I would note that the Court in the consideration of

that case indicated at the conclusion of that hearing that:

"The Court would further find that his attempts--" referring to Mr. Pope excuse me, referring to Mr. Richard Smolin, "That his attempts at this --" to exercise visitation "were frustrated by direct and deliberate acts on the part of Mrs. Pope, and those acts were taken with full acquiescence at least, and perhaps under the direction or dominance exercised over her by Mr. Pope.

"I don't think it is any secret in an evaluation of the testimony of the witnesses in this case that Mr. Pope has exercised a dominant aura of influence in this family structure. He has exercised that aura of influence and domination over at

least the children and probably to some extent over Mrs. Pope.

"The history of the transfers to Oregon, to Texas, to Louisiana all would indicate that his role was not one of a husband acquiescing in the expressed or dominant desires of the wife, but were probably at least in concert with hers. And that he has little if any regard for Mr. Smolin; he has little if any regard for the right of Mr. Smolin to exercise parental guidance and control and sharing and control and custody of his children. And he was an active participant in what the Court has concluded and does conclude was a deliberate and longstanding effort to deprive him of his parental rights.

"Mrs. Pope, from the standpoint of evaluation of witnesses

and credibility and testimony, appeared to the Court to be an extremely bright and intelligent woman. She obviously would have to be. She could not maintain the lifestyle and degree of personal development that she has had if she did not have that innate intelligence. So she cannot plead ignorance.

"And the Court had great difficulty in accepting her testimony that when these children would make inquiry, 'Why doesn't dad call us? Why doesn't dad write us?' that her only response was, 'I don't know.' No one of any limited degree of intelligence could fail to recognize that in those questions to her by the children, there was an inherent plea on the part of the children to let us have contact with

dad, let us -- let us establish a relationship.

"And yet she failed to do that. She failed to do it for whatever reason she had, either vindictiveness against Mr. Smolin or fear that he would somehow achieve a right of relationship which would deprive her somehow of her -- her custody and control of these children.

"The adoption process in Louisiana I can only describe as being verging on the fraudulent. There is -- to go to the agencies and represent that the father has failed to support and failed to communicate would indicate to some government agency handling a case on the routine that they do, probably that phrased that way, it meant that dad had no interest in supporting and dad had no interest

in establishing communications. And yet the history of this case shows that that interest was always there."

The Court would conclude that the findings in the family law case adequately demonstrate that, in fact, the process initiated by Mrs. Pope in Louisiana and her declarations and affidavits were totally insufficient to establish any basis for rights of either herself personally or for the State, in an interest of the State of Louisiana.

The Court would grant the writ of habeas corpus and order the discharge of Mr. Gerard Smolin and Richard Smolin.

(The proceedings were concluded at this time.)

/ / /

SUPERIOR COURT OF THE STATE

OF CALIFORNIA FOR THE COUNTY OF

SAN BERNARDINO

DEPARTMENT NO. 1 HON. WILLIAM PITT HYDE, JUDGE

| | |
|---|---|
| In re GERARD J. SMOLIN and RICHARD SMOLIN on Habeas Corpus | SCV-224030<br>REPORTER'S CERTIFICATE |

STATE OF CALIFORNIA )
) ss
COUNTY OF SAN BERNARDINO )

I, EVA LORENE PALMER, Official Reporter of the Superior Court of the State of California, for the County of San Bernardino, do hereby certify that the foregoing pages 1 through 25 comprise a full, true and correct transcript of the proceedings held in the above-entitled matter on August 24, 1984.

Dated this 30 day

August , 1984.

C.S.R.
Official Reporter, C-4669

SUPERIOR COURT OF THE
STATE OF CALIFORNIA
FOR THE COUNTY
OF SAN BERNARDINO

ACIS CASE NO.:C 0156942
CASE NO.:SCV 224030
JUDGE:WILLIAM PITT HYDE
DATE: TIME:
08/24/84 01 30 PM
DEPT:01
CLERK:JENNIFER DEARDOFF
LARRY F. ROBERTS
JOSEPH BURNS, DDA
BALIFF: ANTHONY JAIME
REPORTER: EVA PALMER
CASE TITLE: IN THE MATTER OF
GERARD J. SMOLIN

---

NATURE OF PROCEEDINGS:

/X/ HEARING ON:
Petitioners' Order To Show Cause
Dated Aug. 15, 1984.
Re: Petition For Writ Of Habeas
Corpus

---

MINUTE ORDER:
The Court hears argument of
Counsel.
Petitioner's Order To Show Cause
is Granted.

Petitioner is Ordered Discharged
from Constrained Custody;
Petition For Writ of Habeas Corpus
is Granted.

_____

I certify that copies of the above
Order were mailed to counsel of
record as indicated on _____
Date

_____
Court Clerk

Sep 41984 2623

EXH. 1

SUPERIOR COURT OF THE
STATE OF CALIFORNIA
FOR THE COUNTY
OF SAN BERNARDINO

ACIS CASE NO.:C 0156942
CASE NO.:SCV 224030
JUDGE:WILLIAM PITT HYDE
DATE: TIME:
08/24/84 01 30 PM
DEPT:01
CLERK:JENNIFER DEARDOFF
Albert Maldonalo
JOSEPH BURNS, DDA
BAILIFF: ANTHONY JAIME
REPORTER: EVA PALMER
CASE TITLE: IN THE MATTER OF
GERARD J. SMOLIN

---

NATURE OF PROCEEDINGS:

/X/ HEARING ON:
Petitioners' For Writ of Habeas Corpus
Dated Aug. 15, 1984.
Re: Petition For Writ Of Habeas Corpus

---

MINUTE ORDER:

The Court hears argument of Counsel.
The Court finds Declaration of Respondent/Defendant are insufficient to establish her rights in that the State of Louisiana:

The Petitioner Is Granted.

Petitioner is Ordered Discharged from Constrained custody.

I certify that copies of the above Order were mailed to counsel of record as indicated on _____
Date

_____
Court Clerk

Sep 41984 2624

EXH. 2

Unreported Opinion of the California Court of Appeal, Fourth Appellate District, Division Two, in case No. E001358, filed March 26, 1985, is reprinted as Appendix B to the Petition for Certiorari

Opinion of the California Supreme Court in case No. LA 32068 filed May 1, 1986, is reprinted as Appendix A to the Petition for Certiorari (opinion reported at 41 Cal.3d 758, 716 P.2d 991)

Order of the California Supreme Court denying rehearing, filed June 5, 1986, is reprinted as Appendix D to the Petition for Certiorari

NOT FOR PUBLICATION

COURT OF APPEAL, FOURTH DISTRICT

DIVISION TWO

STATE OF CALIFORNIA

| | | |
|---|---|---|
| In re the Marriage of RICHARD SMOLIN and JUDITH SMOLIN | ) | |
| RICHARD SMOLIN, Respondent, | ) | No. E001146 (Super.Ct. No.FL 30380) |
| v. | ) | |
| JUDITH SMOLIN POPE, Appellant. | ) | OPINION ON REHEARING |

APPEAL from the Superior Court of San Bernardino County. William Pitt Hyde, Judge. Reversed.

Don A. Haskell for Appellant.

Riordan & Rosenthal, Dennis P. Riordan and Albert H. Maldonado for Respondent.

Judith Smolin Pope appeals from an order confirming a prior order granting sole custody to her former husband, Richard Smolin, and terminating child support.

FACTS

The parties were married in San Bernardino County. The two minor children, Jennifer Leann, born May 31, 1973, and Jamie Christopher, born October 16, 1974, resided in San Bernardino County until November 1979, when Judith removed them from the State of California.

Judith and Richard obtained a final judgment of dissolution of their marriage on April 6, 1978, in the San Bernardino Superior Court. The judgment provided that custody of the minor children was awarded to Judith

with rights of reasonable visitation to Richard.

In August of 1979, Judith was married to her present husband, James Pope, and in November of 1979 she moved with Mr. Pope and the minor children to Oregon. Judith did not advise Richard of her intent to move to Oregon until after she had moved, although she had agreed as a part of their settlement agreement not to leave the state without his consent. Richard received notice of the move about a week after it had occurred. Thereafter, Mr. Pope, who was in the construction business, was offered a position in Dallas, Texas and the family moved to Texas in January of 1980. Again Judith did not inform Richard, and he did not learn of their whereabouts until several months later.

On September 15, 1980, Judith commenced a proceeding in Texas for judicial notice of the California statutes and the California judgment. Richard was served but did not appear in that action.

Thereafter, on October 3, 1980, Richard filed an order to show cause in the San Bernardino Superior Court to modify custody. Judith was served but did not appear. Richard did not advise the California court that a proceeding had been commenced in Texas. On October 27, 1980, Richard obtained an order modifying custody and awarding him joint custody but with primary care remaining with Judith. Richard was granted custody during summer vacations and during the Christmas vacation of 1980. Judith's Texas attorney was served with a copy of this order. He

advised Richard's attorney that it was his opinion the order was not enforceable in Texas due to the lack of jurisdiction in the California court. On January 9, 1981, Richard brought an order to show cause against Judith for contempt of the 1980 joint custody order. He also sought a modification granting him sole custody.

On February 13, 1981, the Texas court issued a decree extending full faith and credit and confirming that Judith had custody of the minor children. There is nothing in the record to show whether Judith's attorney had advised the Texas court of the joint custody or that an order to show cause had been filed in the California court.

On February 27, 1981, the San Bernardino Superior Court found

that Richard had been denied Christmas visitation rights provided in the 1980 joint custody order and granted him sole custody of the children, subject to Judith's right to reasonable visitation. The court also terminated child support.

Richard did not then seek to obtain physical custody of the minors, but did not provide any support for them after December 1980.

In March of 1981, Judith's husband was again transferred and the family moved to Louisiana.

Richard testified that he learned of the children's whereabouts in October of 1982, through a friend of Judith's, and that he did not learn their precise address until January of 1983. He testified that he had his first telephone conversation after they

left Texas on January 13, 1983, and sent them gifts at Christmas in 1983. There was no further contact between Richard and the children until March 9, 1984, although Richard testified that he had some contact with the district attorney's office "towards the end of 1983" and started to discuss the possibility of securing a warrant in lieu of a writ of habeas corpus. However, no action was taken to secure the warrant until he was served in an adoption proceeding in Louisiana.

In January of 1984, Judith and her husband filed a petition in a Louisiana court for the adoption of the minors by Mr. Pope. Richard was served in that action sometime in February of 1984.

On March 9, 1984, at approximately 7:20 a.m., Richard,

without notice to Judith, removed the children from a school bus stop in Slidell, Louisiana.

As a result of the removal of the children without use of legal process and without notice to Judith, criminal proceedings were initiated, Richard was charged with kidnapping, and extradition was sought against Richard by the State of Louisiana. (See San Bernardino Superior Court Case No. SCV 224030.)

In explaining his use of self-help, Richard testified as follows:

"Q (BY MR. RICHARDSON) Now, I believe it was in January, you testified that you were served with a petition for a non-consentual [sic] adoption

and name change; is that correct?

"A That's correct.

"Q January of '84?

"A That's correct.

"Q And you were at that time contemplating the service of the warrant in lieu of writ of habeas corpus?

"A I had thought about it because I had previous contact with the District Attorney's Office. But upon receipt of the non-consentual [sic] stepparent adoption, petition and name change, it was the very first step that I took to secure my custody of the children.

"Q Now, was it your understanding that if this

warrant in lieu of writ were served in Louisiana, that the children would immediately be returned to you in California or that there would be some proceedings?

"A It was my understanding that if I attempted to use the warrant in lieu of writ of habeas corpus in light of a stepparent adoption proceedings pending, that the -- all the issues would end up being litigated in Louisiana, including the validity of the California order."

On April 11, 1984, Judith initiated an order to show cause in the San Bernardino Superior Court to set aside the custody order of February 27,

1981, whereby Richards was awarded sole custody and child support was terminated. It is from the court's reaffirmation of those orders on May 31, 1984 that this appeal has been taken.

DISCUSSION

Judith raises the following issues on appeal:

(1) Did the California court have jurisdiction over the custody issues?

(2) Assuming jurisdiction, did the trial court abuse its discretion by exercising jurisdiction and removing physical custody from appellant in light of respondent's unclean hands?

(3) Did the trial court abuse its discretion by finding it in

the best interests of the children to confirm sole custody in the respondent?

I. Jurisdiction

The Uniform Child Custody Act, Civil Code section 5152,[1/] sets forth jurisdictional grounds in child custody matters. The provisions pertinent to this case are as follows:

"(1) A court of this state which is competent to decide child custody matters has jurisdiction to make a child custody determination by initial or modification decree if the conditions as set forth in any of the following paragraphs are met:

"(a) This state (i) is the home state of the child at the time of commencement of the proceeding, or (ii) had been the child's home state within

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1. All statutory references are to the Civil Code unless otherwise stated.

six months before commencement of the proceeding and the child is absent from this state because of his removal or retention by a person claiming his custody or for other reasons, and a parent or persons acting as parent continues to live in this state.

"(b) It is in the best interest of the child that a court of this state assume jurisdiction because (i) the child and his parents, or the child and at least one contestant, have a significant connection with this state, and (ii) there is available in this state substantial evidence concerning the child's present or future case, protection, training, and personal relationships.

". . . . . .

"(3) Physical presence of the child, while desirable, is not a

prerequisite for jurisdiction to determine his custody."

It is clear that California was not the "home state" within the meaning of subdivision (a). "Home state" is defined by the Uniform Child Custody Act, section 5151, as follows:

"(5) 'Home state' means the state in which the child immediately preceding the time involved lived with his parents, a parent, or a person acting as parent, for at least six consecutive months, and in the case of a child less than six-months old the state in which the child lived from birth with any of the persons mentioned. Periods of temporary absence of any of the named persons are counted as part of the six-month or other period."

In January of 1981, when Richard initiated his first order to show cause for a modification of the custody decree, the children had not resided in the state of California since November 1979. They had been living with their mother and stepfather continuously since they left California and had resided in Texas for more than one year.

Thus, Texas was the home state within the meaning of subdivision (a) at the time Richard's initial request for modification was filed. Furthermore, the jurisdiction of the Texas court had already been invoked prior to the filing of his order to show cause for modification.

Nevertheless, the fact that Texas had become the home state did not

necessarily oust California of modification jurisdiction.

In Kumar v. Superior Court (1982) 32 Cal.3d 689, the California Supreme Court considered the difference between initial jurisdiction and modification jurisdiction and concluded that under section 5163,[2/] the strong presumption is that the decree state

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2. Section 5163 in part provides:

> "(1) If a court of another state has made a custody decree, a court of this state shall not modify that decree unless (a) it appears to the court of this state that the court which rendered the decree does not now have jurisdiction under jurisdictional prerequisites substantially in accordance with this title or has declined to assume jurisdiction to modify the decree and (b) the court of this state has jurisdiction."

will continue to have modification jurisdiction until it loses all or almost all connection with the child.

Moreover, "'Exclusive continuing jurisdiction is not affected by the child's residence in another state for six months or more. Although the new state becomes the child's home state, significant connection jurisdiction continues in the state of the prior decree where the court record and other evidence exists and where one parents or another contestant continues to reside.'" (Kumar v. Superior Court, at p. 696, quoting with approval Bodenheimer, Interstate Custody: Initial Jurisdiction and Continuing Jurisdiction Under the UCCJA (1981) 14 Fam. L.Q. 203, 214-215.)

In Kumar the Supreme Court found a "significant connection" with

the home state of New York although the child had been absent for 18 months at the time of the commencement of the California proceeding.

The basis for California modification jurisdiction in this case and the one relied on in the change of custody order, was subdivision (b). In its order of February 27, 1981, modifying custody, the court stated:

"1. That the minor children have sufficient contacts with the State of California to continue to provide a basis, for the Superior Court, State of California, County of San Bernardino, to exercise continuing and concurrent jurisdiction, pursuant to Civil Code section 5152, subdivision (1)(b) as construed together with Civil Code

section 4600 as amended and 4600.5 as enacted."[3/]

The San Bernardino Superior Court in the February 27, 1981, order went on to make the following findings:

"2. That the Petitioner has been frustrated in facilitating the order of this Court, dated October 27, 1980, with respect to the Christmas

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3. Civil Code section 4600 and 4600.5 do not assist in the determination of jurisdiction as section 4600.5 specifically provides in subparagraph (j) that: "Any order for the custody of a minor child of a marriage entered by a court in this state or any other state may, subject to the jurisdictional requirements set forth in Sections 5152 and 5163, be modified at any time to an order of joint custody in accordance with the provisions of this section."

Moreover, the specific provisions of the Uniform Child Custody Act relating to jurisdiction prevail over more general provisions of Civil Code section 4600 and Code of Civil Procedure section 401.50. (In re Marriage of Steiner (1979) 89 Cal.App.3d 363, 371; Smith v. Superior Court (1977) 68 Cal.App.3d 457.

visit, provided in the order, as a result of Respondents [sic] refusal to allow any contacts between the Petitioner and said minor children.

"3. That it is not in the best interests of the minor children that the Petitioner be deprived of frequent continuing and meaningful contacts with the minor children. That it is in the best interests of the minor children that sole custody be awarded to the Petitioner subject to the Respondents [sic] right of reasonable visitation."

It is not enough merely to state that it is in the best interest of the children that a California court assume jurisdiction. Section 5152, subdivision 1(b) clearly requires that the finding of best interest be predicated upon the fact that "the

child and his parents, or the child and at least one contestant, have a significant connection with this state, and . . . there is available in this state substantial evidence concerning the child's present or future care, protection, training, and personal relationships."

After a careful review of the record, we conclude that there is substantial evidence to support the finding of modification jurisdiction.

At the time of the initial hearing, although Judith had had continuous custody of the minor children since the parties' separation on March 9, 1977, when the children were aged 4 years (Jennifer) and 2 years (Jamie), Richard had exercised his right to visitation until Judith

removed them from with the State of California in November of 1979.

Because the children had spent the first several years of their lives in California, and the father continued to exercise visitation with the children until prevented by Judith's removal of the children, it cannot be said that there was insufficient evidence to support the trial court's finding of a significant connection with the state within the standard established by Kumar.

II. Unclean Hands

Judith contends that, even if the California superior court had jurisdiction at the time of the modification hearing, it was an abuse of discretion to exercise jurisdiction because of Richard's unclean hands.

The Uniform Child Custody Act, section 5157, provides in pertinent part as follows:

"(1) If the petitioner for an initial decree has wrongfully taken the child from another state or has engaged in similar reprehensible conduct the court may decline to exercise jurisdiction for purposes of adjudication of custody if this is just and proper under the circumstances.

"(2) Unless required in the interest of the child, the court shall not exercise its jurisdiction to modify a custody decree of another state if the petitioner, without consent of the person entitled to custody has improperly removed the child from the physical custody of the person entitled to custody or has improperly retained the child after a visit or other

temporary relinquishment of physical custody. If the petitioner has violated any other provision of a custody decree of another state the court may decline to exercise its jurisdiction if this is just and proper under the circumstances." (Emphasis added.)

It is clear that if Richard had made an initial application for custody after the removal of the children from Louisiana without legal process and without the knowledge of the mother, the court could have declined jurisdiction pursuant to the discretionary provisions of subdivision (1).[4/]

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4. It is also noteworthy that if Judith had sought to modify the California decree in another Uniform Code state, that state court could have declined jurisdiction pursuant to the discretionary provision of subdivision (2), based upon her removal of the

However, because the abduction did not occur until after Richard's successful application for modification in the San Bernardino court, the mandatory provisions of subparagraph (2) do not apply. In any event, Judith may not now collaterally attack the February 1981 order on any but jurisdictional grounds.

III. Abuse of Discretion

The order before this court on appeal is the order of May 31, 1984, "reaffirming" the sole custody in Richard which was granted under the order of February 27, 1981. Therefore, it is the May 1984 order we must consider in the light of appellant's argument that the court abused its

---

children from California in violation of the custody order.

discretion in granting Richard physical custody of the children.

At the time of the hearing leading to that order, both parties were before the court with unclean hands. Judith had removed the children from the State of California without notice and had otherwise frustrated Richard's right to visitation with the children. Richard had failed to pay child support even prior to the time he obtained a court order that, if properly executed, would have relieved him of that requirement. Further without the use of legal process Richard had removed the children from Louisiana without notifying Judith either before or after the abduction.

Clearly the conduct of both parties and particularly Richard's manipulation of the court in respect to

obtaining custody of the children is violative of many of the stated purposes of the Uniform Child Custody Act, which are, in pertinent part, as follows:

"(1) The general purposes of this title are to: . . .

"(c) Assure that litigation concerning the custody of a child take place ordinarily in the state with which the child and his family have the closest connection and where significant evidence concerning his care, protection, training, and personal relationships is most readily available, and that courts of this state decline the exercise of jurisdiction when the child and his family have a closer connection with another state.

"(d) Discourage continuing controversies over child custody in the interest of greater stability of home environment and of secure family relationships for the child.

"(e) Deter abductions and other unilateral removals of children undertaken to obtain custody awards. . . ." (§ 5150.)

Nevertheless, because we have found that the San Bernardino Superior Court had jurisdiction, the only remaining issue before this court is whether the trial court abused its discretion when it confirmed the award of sole custody of the children to Richard.

At the time of these proceedings Civil Code section 4600.5 read in part as follows:

"(a) There shall be a presumption, affecting the burden of proof, that joint custody is in the best interests of a minor child where the parents have agreed to an award of joint custody or so agree in open court at a hearing for the purpose of determining the custody of a minor child of the marriage.

"(b) Upon the application of either parent, joint custody may be awarded in the discretion of the court in other cases. For the purpose of assisting the court in making a determination whether an award of joint custody is appropriate under this subdivision, the court may direct that an investigation be conducted pursuant to the provisions of Section 4602.

"(c) Whenever a request for joint custody is granted or denied, the

court, upon the request of any party, shall state in its decision the reasons for granting or denying the request. A statement that joint physical custody is, or is not, in the best interests of the child shall not be sufficient to meet the requirements of this subdivision.

". . . . . .

"(j) Any order for the custody of a minor child of a marriage entered by a court in this state or any other state may, subject to the jurisdictional requirements set forth in Sections 5152 and 5163, be modified at any time to an order of joint custody in accordance with the provisions of this section."

In connection with the May 1984 order, no request was made for a statement of reasons pursuant to

subdivision (c). However, the court made a lengthy statement at the time the decision was rendered.

That statement included the following comments on the evidence.

"These children love and respect the parties involved in this case.

". . . . . .

"This case is a difficult one in that in the ordinary custody case, we have a tug and pull between parents. But they are at least somewhat on a par. And whatever we decide, we can assure communication, and we can assure, by order or otherwise, continuing relationships.

"I have serious concerns about this case. I think we are into a position now where we cannot guarantee that. I don't see how this can can be

solved with the standard approach. And I think it's -- it is -- at this juncture, we are in a hopeless Catch 22 position.

"Let me throw out a couple of possibilities. Number one, what do we do with these children if we give them in effect to Mrs. Pope and say, well, you've done such a good job with them up to now, you should continue. And -- but -- and we now accept what you tell us, that you guarantee to Rick Smolin the rights of contact and sharing of growing-up children that the law requires, and that you, Mrs. Pope, now say you recognize.

". . . . . .

"On the other hand, if we leave the children with Mr. Smolin, what guarantee do we have that, Mrs. Pope, that you can have meaningful

contact and sharing of contact with these children? Because if Mr. Smolin has his say about it, it may well be that those children will not travel to Louisiana for visitation and that some form of visitation will have to be structured out here.

". . . . . .

"So we then come to the decision of what do we do with these -- with these children.

"There is no question in my mind that the Popes are caring and concerned parents. They obviously are caring and concerned parents. I've had an opportunity to witness that from the testimony of the parties on the witness stand and also in the handling of their own small child here in the court when we invited the child to be present so

that the parties could hear what was going on.

". . . . . .

"We know that the Popes, as I indicated, are caring and concerned parents. We don't know about Rick Smolin. Rick Smolin hasn't had the chance. And he didn't have the chance because -- this Court concludes -- that his efforts at having that chance were frustrated at every turn. They were frustrated to the extent that he did not accomplish any contact -- any meaningful contact with these children for essentially their whole childhood, since the date of separation.

"Why weren't his attempts better or more forceful or more persistent or more skillful? I can't answer that . . . .

". . . . . .

". . . The evidence is that he made every reasonable effort to maintain a relationship with the children and to exercise the visitation rights which he always had through the State of California proceedings.

"The Court would further find that his attempts at this were frustrated by direct and deliberate acts on the part of Mrs. Pope, and those acts were taken with full acquiescence at least, and perhaps under the direction or dominance exercised over her by Mr. Pope.

". . . . . .

"Again, the parties have put themselves in this spot. I can only extricate you from this spot to the point of my abilities of making an order at this point. And the order of the Court has been, since the 19- --

since the prior order of the change of custody, been one where custody is with Mr. Smolin. I see no reason to change that order.

"The order of the Court will either be reaffirmed, however you want to phrase it as far as the formal orders are concerned. The order is reaffirmed that custody is with him and is solely with him.

"And the reason it is sole and not joint I think is obvious from the comments of the Court. Joint custody is not a situation that will work in this atmosphere of litigation that now spans two states and perhaps involves federal proceedings as well.

"The visitation -- this Court will not at this juncture get itself into a spot of trying to dictate how these people are going to solve this

problem. The visitation of Mrs. Pope should be reasonable, and the Court will leave it at that. That of course is a touchy situation, because it puts Mrs. Pope at the mercy of Mr. Smolin in dictating the terms and conditions of visitation. If we wanted to be harsh about it, we could say it's merely now putting the shoe on the other foot." (Emphasis added.)

There is nothing in the record to suggest that there was any investigation of the respective homes or other circumstances of the background provided by the two families. The only evidence presented by the Family Court Services Mediator with respect to any investigation was that she interviewed all the parties. No testimony was given relating any independent investigation by the

mediator and the only reference to the school records of these children were statements of the children themselves regarding preferences.

Yet based upon this limited evidence the court awarded the father sole custody of these children, now aged 10 and 12 years, without any structured provision to guarantee visitation by the mother.

While it is certainly sad that the father's efforts at visitation were frustrated to the extent they were, that alone does not provide adequate factual basis to support an award of sole custody to the father. Absent any showing that it is in the best interest of the children for them to be separated from the mother who has had the responsibility of their care and nurturing for their entire lives,

the sole custody order in this case can only be viewed as punitive.

We find that it was an abuse of discretion for the trial court to confirm the award of sole custody in this case.

The other awarding custody to Richard is reversed and the matter remanded for further proceedings consistent with the Uniform Child Custody Act.

NOT FOR PUBLICATION.

MORRIS
P.J.

We concur:

MC DANIEL
J.

RICKLES
J.

DECLARATION OF SERVICE BY MAIL

Case Name: People of the State of California v. Superior Court of the State of California, for the County of San Bernardino (Richard Smolin and Gerard Smolin, Real Parties in Interest.)

Court No. 86-381

(Service Pursuant to United States Supreme Court, Rule 28(5)(c)

I declare that I am employed in the County of Sacramento, California. I am 18 years of age or older and not a party to the within entitled cause; my business address is 1515 "K" Street, Suite 511, P. O. Box 944255, Sacramento, California 94244-2550.

On January 15, 1987, I served that attached JOINT APPENDIX, in said cause, by placing a true copy thereof enclosed in a sealed prepaid, in the United States mail at Sacramento, California, addressed as follows:

Dennis P. Riordan, Attorney at Law
523 Octavia Street
San Francisco, California 94102

I declare under penalty of perjury that all parties required to be served have been served, and the foregoing is true and correct and that this declaration was executed at Sacramento, California, on January 15, 1987.

_____
(Signature)